

**United States Department of Labor
Employees' Compensation Appeals Board**

M.M., Appellant

and

**DEPARTMENT OF THE INTERIOR, FISH &
WILDLIFE SERVICE, Hadley, MA, Employer**

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**Docket No. 17-0197
Issued: May 1, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 7, 2016 appellant filed a timely appeal from a May 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established permanent impairment of a scheduled member or function of the body causally related to his accepted Lyme disease.

FACTUAL HISTORY

On June 16, 2009 appellant, then a 37-year-old biological science technician, filed an occupational disease claim (Form CA-2) alleging that he contracted Lyme disease and experienced various symptoms such as headaches, fatigue, muscle weakness, joint pain, and arthritis due to

¹ 5 U.S.C. § 8101 *et seq.*

factors of his federal employment. He explained that, on June 5, 2008, he was performing bird surveys and later that evening pulled two ticks off of his waist. Appellant indicated that in the weeks leading up to July 1, 2008 he became more fatigued and weak. He reported that he first became aware of his condition and its relation to his federal employment on July 1, 2008. Appellant noted that the last date of exposure to his work environment was on July 7, 2009.

OWCP accepted appellant's claim for Lyme disease; tick-borne fever.

Appellant stopped work effective October 11, 2009 when his temporary appointment expired. On September 19, 2011 he filed a claim for wage-loss compensation (Form CA-7) for the period October 12, 2009 to September 10, 2011 and received disability compensation.

In February 2012, appellant began full-time private sector employment delivering auto parts to various auto shops.

On May 20, 2013 appellant filed a claim for a schedule award (Form CA-7). In a statement dated September 3, 2013, he indicated that he was submitting documentation in support of his schedule award claim. Appellant also related that he was enclosing additional documentation to include hypothyroidism as an accepted condition.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Michael Silverman, a Board-certified internist specializing in infectious diseases, for a second opinion evaluation to determine whether appellant had a ratable permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)² due to his accepted Lyme disease condition.

In an August 29, 2013 second opinion report, Dr. Silverman provided an accurate history of appellant's injury and noted that appellant's claim was accepted for tick bite and Lyme disease. He related that appellant began to experience symptoms of extreme fatigue, headaches, and muscle weakness and sought medical treatment on July 14, 2008. Dr. Silverman reviewed appellant's medical records and described the medical treatment appellant received. He noted that initial testing for Lyme disease was negative. Dr. Silverman further noted that the initial enzyme-linked immunosorbent response (ELISA) test from July 2008 was negative and the Western blot test except for one band, were both positive. He pointed out that March 8, 2011 laboratory test results were also negative for Lyme serology and Western blot. Upon physical examination, Dr. Silverman reported normal head, ear, eyes, nose, and throat examination, normal extremity examination with full range of motion, and normal neurological examination. He indicated that laboratory test results were also within normal limits with respect to all types of Lyme and associated tick-related organisms.

Dr. Silverman opined that appellant had a completely normal physical examination. He recommended that appellant undergo a functional capacity evaluation (FCE) to determine his clinical status. Dr. Silverman pointed out that appellant had multiple subjective complaints, which were not supported by objective findings on both laboratory studies and physical examination.

² A.M.A., *Guides* (6th ed. 2009).

Regarding whether appellant sustained an impairment rating pursuant to the A.M.A., *Guides*, Dr. Silverman opined that there was no evidence that appellant had any permanent impairment which could be rated for loss of function due to Lyme disease. He pointed out that appellant had worked full time for AutoZone since February 2012 with physically heavy duties and appeared to have no significant limitation or restriction to this type of work. Dr. Silverman reported that there was no clear-cut evidence that appellant had any evidence of Lyme disease or chronic Lyme disease. He concluded that appellant did not have any current medical condition or disability as a result of the accepted employment injury.

On September 3, 2013 appellant underwent an FCE by Amanda Gallagher, a physical therapist. Ms. Gallagher indicated that appellant's symptoms of chronic fatigue due to his Lyme disease illness may cause him to be unable to work full time. She explained that because of the unpredictable nature of appellant's Lyme disease illness, it was difficult to test during an FCE. Ms. Gallagher concluded that appellant could seek work in a position which would not require floor level lifting greater than 40 pounds, and no above waist lifting greater than 45 pounds. She also noted that appellant should be allowed to sit briefly to rest after prolonged standing (greater than two hours).

On November 2, 2013 Dr. Lawrence A. Manning, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the evidence of record, including the SOAF, Dr. Silverman's August 29, 2013 second opinion report, and the September 3, 2013 FCE. He noted that appellant's claim was accepted for Lyme disease. Dr. Manning pointed out that Dr. Silverman's August 29, 2013 examination showed no evidence of abnormal joint, musculoskeletal, central nervous system, or other abnormalities and was an essentially normal physical examination. He opined that based on the medical records he reviewed there was no objective evidence of permanent impairment of the bilateral upper or lower extremities.

OWCP denied appellant's schedule award claim in a decision dated December 16, 2013. It found that the medical evidence of record did not establish that appellant sustained any permanent impairment to a scheduled member or function of the body that was causally related to his accepted employment injury. OWCP found that the reports of Dr. Silverman, the second opinion examiner, and Dr. Manning, OWCP's medical adviser, demonstrated that appellant did not have any ratable permanent impairment pursuant to the A.M.A., *Guides* and was not entitled to a schedule award.

On January 13, 2014 appellant requested reconsideration and submitted a position description for a biological science technician.

By decision dated January 15, 2014, OWCP denied appellant's reconsideration request. It found that appellant had not submitted evidence to warrant further merit review under 5 U.S.C. § 8128(a). OWCP explained that the evidence appellant submitted was irrelevant or immaterial to the issue of appellant's schedule award claim.

On May 9, 2014 appellant again requested reconsideration. In statements dated January 6 and March 1, 2014, he requested a second FCE that would measure the impairment of his physical abilities with respect to his former employment duties. Appellant noted that the FCE conducted on September 3, 2013 did not consider the level of delayed fatigue and muscle weakness after the

examination was finished. He alleged that permanent impairment of his thyroid gland, as a result of Lyme disease, should be a basis for a schedule award. Appellant further inquired about when he could expect a decision on adding hypothyroidism as an accepted condition.

Dr. Silverman provided an addendum report dated April 23, 2014. He related that, upon review of appellant's medical records, he found no indication that appellant had hypothyroidism. Dr. Silverman noted that appellant had normal thyroid tests. He also explained that there was no clear-cut evidence that hypothyroidism was the result of or secondary to a history of Lyme disease. Dr. Silverman concluded that there was no additional condition that should be added to appellant's claim.

Appellant provided another statement dated July 6, 2014. He alleged that he had not yet received a formal decision on adding hypothyroidism as an accepted condition. Appellant also asserted that Dr. Silverman was not qualified to make any conclusions regarding his thyroid issues because he was not an endocrinologist. He pointed out that in January and February 2009 he tested positive for many laboratory test and diagnostic examination results, which were indicative of thyroiditis or thyroid disease. Appellant alleged that his Lyme disease, which went undiagnosed and untreated for seven months, caused him to develop thyroiditis and an overactive hyperthyroid. He asserted that his thyroid had remained in a hypothyroid state, for which he took medication to control.

Along with his statements, appellant also provided medical reports dated from 2008 and 2009. He submitted various laboratory test results and diagnostic scan reports from 2008 to 2009, which were indicative of thyroid disease. Appellant also provided several reports from Dr. Levin dated March 11 to July 16, 2009. In a March 11, 2009 statement, Dr. Levin reported that appellant had shown a strongly positive Lyme Dot Antigen test. He related that it was conceivable that appellant's thyroiditis was a manifestation of Lyme disease.

By decision dated July 18, 2014, OWCP denied appellant's request to expand the acceptance of his claim to include hypothyroidism or thyroiditis. It found that the medical evidence of record did not establish that appellant's diagnosed thyroid condition resulted from his employment injury. OWCP noted that the medical reports from appellant failed to establish a causal relationship between appellant's accepted Lyme disease injury and his thyroid condition.

On December 16, 2014 appellant requested reconsideration of the December 16, 2013 decision. In support of his request, appellant submitted various diagnostic examination and laboratory test results dated August 10, 2003 to April 9, 2014. He resubmitted a position description for biological science technician and Mr. McCauley's December 10, 2012 statement regarding appellant's employment duties. Appellant also provided an August 6, 2008 medical report from Shawna Biowc, a nurse practitioner regarding treatment for his complaints of body aches, joint stiffness, or sleep problems. He resubmitted Dr. Levin's July 16, 2009 report and Dr. Armenti-Kapros' April 1, 2009 report.

Dr. Anastasia Cleary, a family practitioner, treated appellant and provided an attending physician's report (Form CA-20) dated December 2, 2014. She related appellant's complaints of fatigue and joint pain and noted a diagnosis of chronic Lyme disease. Dr. Cleary checked a box marked "yes" indicating that appellant's condition was caused or aggravated by factors of his

federal employment. She described the treatment appellant received and opined that he was totally disabled. In a December 4, 2014 work capacity evaluation form, Dr. Cleary noted that appellant's claim was accepted for tick-borne fever and Lyme disease. She indicated that appellant was unable to perform his job.

By decision dated March 12, 2015, OWCP denied modification of its December 16, 2013 decision. It found that the medical evidence submitted with appellant's reconsideration request failed to support a measurable impairment of a scheduled member or function of the body pursuant to the A.M.A., *Guides*.

On February 16, 2016 appellant again requested reconsideration. In a July 25, 2015 statement, he indicated that he was requesting reconsideration based upon a May 24, 2015 impairment evaluation performed by Dr. Christopher R. Brigham, Board-certified in family and occupational medicine. Appellant explained that he was also submitting unbiased information concerning Lyme disease, which he believed supported his previous complaints of residual symptoms from Lyme disease. He reported that approximately 10 to 20 percent of patients with Lyme disease have symptoms that last months to years after treatment. Appellant noted that these symptoms could include muscle and joint pains, cognitive difficulties, sleep disturbances, or fatigue. He reported that this condition is referred to as post-treatment Lyme disease syndrome (PTLDS) and that the exact cause of PTLDS was not yet known. Appellant indicated that most individuals with Lyme disease respond well to antibiotics and had a full recovery, but a small percentage of individuals may continue to experience recurring symptoms.

In a May 24, 2015 report, Dr. Brigham related that appellant worked for the employing establishment and noticed two tick bites around his waist in June 2008. He reported that appellant complained of overall muscle pains, episodic pain upper back pain, base of neck, and upper arm posterior shoulder pain. Dr. Brigham also noted that appellant complained of sensation "weakness," particularly in the legs. He reported normal range of motion of appellant's cervical spine, shoulders, elbows, wrists, lumbar spine, hips, knees, and ankles. Dr. Brigham indicated that appellant complained of weakness and pain in his thighs after completing the progressive inertia lifting test.

In a May 24, 2015 impairment rating assessment report, Dr. Brigham related appellant's complaints of multiple systems and functional difficulties, which he attributed to Lyme disease. He indicated that subjective complaints were more marked than objective. Dr. Brigham reported an MMI date of April 27, 2015. He explained that under the A.M.A., *Guides* there was no ratable impairment for Lyme disease, but there may be impairment for organ system dysfunction secondary to the disease. Dr. Brigham related that, although appellant had musculoskeletal symptoms, he did not have ratable impairment per the musculoskeletal chapters. He opined that appellant may have impairment based on the subjective report of pain according to Chapter 3 and outlined the steps for assessment. Dr. Brigham related that, based on appellant's Pain Disability Questionnaire (PDQ) score of 87, he would be classified as "moderate." He explained that according to Table 3-1 Pain-Related impairment and whole person impairment based on PDQ appellant had one percent whole person impairment. Dr. Brigham noted that, if appellant was rated for thyroid abnormalities under Table 10-6, it was "probable" that appellant would be assigned class 1 for one percent impairment rating. He also indicated that there could be a ratable impairment for psychiatric symptoms, including depression, but there was inadequate information

to assess this rating. Dr. Brigham calculated that the one percent whole person impairment for pain and the additional one percent whole person impairment, if rated for thyroid disease, would total two percent whole person impairment. He reported that a conservative approach, “including raising questions about the appropriateness of rating pain and questioning the relationship between his Lyme disease and thyroid disease, would result in the conclusion there is no ratable impairment.” Dr. Brigham concluded that, if provided with “the benefit of the doubt,” there was two percent whole person permanent impairment.

By decision dated May 12, 2016, OWCP denied modification of its March 12, 2015 decision. It found that the medical evidence of record was insufficient to support a permanent impairment of a scheduled member or function of the body under the A.M.A., *Guides*. OWCP determined that Dr. Brigham did not provide a definitive conclusion that appellant sustained a permanent impairment of a scheduled member of his body due to his accepted Lyme disease condition.

LEGAL PRECEDENT

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.³ With respect to a schedule award, it is the claimant’s burden of proof to establish a permanent impairment of the scheduled member as a result of his or her employment injury.⁴ A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.⁵ The medical evidence must include a detailed description of the permanent impairment.⁶

The schedule award provisions of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has

³ *John W. Montoya*, 54 ECAB 306 (2003).

⁴ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁵ *See Rose V. Ford*, 55 ECAB 449 (2004).

⁶ *See Vanessa Young*, 55 ECAB 575 (2004).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

concurrent in such adoption.⁹ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.¹⁰

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.¹¹ The list of scheduled members includes the eye, arm, hand, fingers, leg, foot, and toes.¹² Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹³ By authority granted under FECA, the Secretary of Labor expanded the list of scheduled members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina, and skin.¹⁴

In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment of a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.¹⁵

ANALYSIS

OWCP accepted appellant's claim for tick bite and Lyme disease. On May 20, 2013 appellant filed a claim for a schedule award. OWCP denied his schedule award claim, finding that the medical evidence of record failed to establish that he sustained any permanent impairment to a scheduled member of the body causally related to the accepted injury. The Board finds that appellant has not established entitlement to a schedule award because the medical evidence of record does not support any permanent impairment of a scheduled member or function of the body due to his accepted Lyme disease condition.

In support of his schedule award claim, appellant submitted a May 24, 2015 impairment rating report by Dr. Brigham. He provided examination findings of normal range of motion of appellant's cervical spine, shoulders, elbows, wrists, lumbar spine, hips, knees, and ankles. Dr. Brigham reviewed appellant's history and reported an MMI date of April 27, 2015. He explained that under the A.M.A., *Guides* there was no ratable impairment for Lyme disease, but there may be impairment for organ system dysfunction secondary to the disease. Dr. Brigham indicated that according to the A.M.A., *Guides*, Table 3-1, Pain-Related impairment, appellant would be rated as one percent whole person impairment. Although he found a one percent whole person impairment due to pain, FECA, as noted, does not allow schedule awards for impairment

⁹ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ *W.C.*, 59 ECAB 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

¹² 5 U.S.C. § 8107(c).

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.404(b).

¹⁵ *See T.O.*, Docket No. 16-1328 (issued March 13, 2017); *O.H.*, Docket No. 15-1692 (issued January 4, 2016); *see also George E. Williams*, 44 ECAB 530 (1993).

of the body as a whole.¹⁶ Accordingly, Dr. Brigham's whole person impairment rating based on pain-related impairment does not comport with OWCP's procedures and is insufficient to establish any ratable impairment.¹⁷

Dr. Brigham also noted that under Table 10-6, it was "probable" that appellant would be assigned class 1, resulting in one percent whole person impairment rating, if appellant was rated for thyroid abnormalities, as previously noted schedule awards are not allowed for impairment of the body as a whole.¹⁸ The Board also notes that as OWCP has not accepted appellant's condition for a thyroid condition, he is not entitled to a schedule award for this condition.¹⁹

OWCP referred appellant to Dr. Silverman, a Board-certified internist, to determine the nature and extent of any employment-related impairment. OWCP's medical adviser, Dr. Manning, reviewed the August 29, 2013 second opinion report of Dr. Silverman, who found normal head, ear, eyes, nose, and throat examination, normal extremity examination with full range of motion, and normal neurological examination. He further reported that laboratory test results were within normal limits with respect to all types of Lyme and associated tick-related organisms. Dr. Silverman also pointed out that March 8, 2011 laboratory test results were also negative for Lyme serology and Western blot. He related that appellant had multiple subjective complaints, which were not supported by objective findings on both laboratory studies and physical examination. Regarding whether appellant sustained an impairment rating pursuant to the sixth edition of the A.M.A., *Guides*, Dr. Silverman opined that there was no evidence that appellant had any need for impairment calculated for Lyme disease or any loss of function due to Lyme disease. He concluded that appellant did not have any current impairment or disability as a result of the employment injury.

In a November 2, 2013 report, Dr. Manning, an OWCP medical adviser, reviewed appellant's case, including the SOAF and Dr. Silverman's August 29, 2013 second opinion report. He noted that appellant's claim was accepted for Lyme disease. Dr. Manning pointed out that Dr. Silverman's August 29, 2013 examination showed no evidence of abnormal joint, musculoskeletal, central nervous system, or other abnormalities and was an essentially normal physical examination. He also pointed out that a September 3, 2013 FCE showed that appellant had high physical effort over liability. Dr. Manning opined that the medical records showed no objective evidence of permanent impairment of the bilateral upper or lower extremities. The Board finds that OWCP's medical adviser, Dr. Manning, properly reviewed the medical record and found no basis for rating impairment to a scheduled member of the body.²⁰ He noted that there was no objective medical evidence of impairment of the bilateral upper or lower extremities resulting from

¹⁶ *J.G.*, Docket No. 12-0995 (issued October 22, 2012).

¹⁷ *See H.L.*, Docket No. 12-0510 (issued August 15, 2012).

¹⁸ *Supra* note 14.

¹⁹ *Id.*; *see also T.M.*, Docket No. 15-1477 (issued October 22, 2015).

²⁰ The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the examining physician to determine the permanent impairment. Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.200.4 (October 1990); *Tommy R. Martin*, 56 ECAB 273 (2005).

appellant's accepted Lyme disease condition and that, therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

The additional medical reports, diagnostic scan reports, and laboratory test results are also insufficient to establish appellant's entitlement to a schedule award for impairment of a scheduled body member as none of the physicians reached any conclusion with regard to permanent impairment.²¹ Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* addressing how he has a ratable impairment of a scheduled body member. Accordingly, the weight of the medical opinion evidence is accorded to Dr. Manning's November 2, 2013 report in which he interpreted the clinical findings of and Dr. Silverman's August 29, 2013 second opinion report.

On appeal appellant asserts that he continues to suffer from permanent effects of Lyme disease. He contends that Dr. Brigham determined that he was entitled to a schedule award for a two percent whole person impairment. As explained above, however, Dr. Brigham's report does not comport with the A.M.A., *Guides* and OWCP's procedures and is, therefore, insufficient to establish the extent of any ratable permanent impairment as a result of appellant's accepted Lyme disease condition.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to permanent impairment of a scheduled member or function of the body causally related to his accepted Lyme disease condition.

²¹ 20 C.F.R. § 10.404 (1999); *see also* Jacqueline S. Harris, 54 ECAB 139 (2002).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board